

**04-50        ALLEN V. OFFICE OF PERSONNEL MANAGEMENT**

Decision Below:    Unpublished

QUESTIONS PRESENTED

1.    Whether the Federal Circuit Court of Appeal improperly concluded that it lacked jurisdiction to consider a federal employee's appeal of the MSBP and related administrators' denial of his disability retirement application when on appeal the appellant raised questions of serious procedural and substantive law errors committed by MSPB rather than challenged the MSPB' s interpretation of medical evidence?<sup>1</sup>
2.    Whether an MSPB decision that does not set forth the appropriate standards which it used to deny a disability retirement application and/or issues a denial that directly contradicts other MSPB decisions embodies an arbitrary MSPB decision necessitating a reversal by the Federal Circuit Court with instructions to apply the appropriate, non-arbitrary legal standards?
3.    Whether under Title 5 C.F.R. § 1201.115 a federal employee is entitled to disability retirement benefits when, because *of* a medical condition, he is A) regularly using Leave Without Pay (LWOP) that has been disapproved in advance or B) only providing part time service in a full time position or C) only working with informal and impermanent accommodation or D) demonstrating attendance that has justified removal in other cases, or E) exhibiting performance that warrants denial of a within-grade increase or other remedial action.

---

<sup>1</sup> In Petitioner ETHAN ALLEN's case the Federal Circuit Court of Appeal relied primarily on *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 791 (1985) as the basis for denial of jurisdiction. In *Lindahl*, the Supreme Court ruled: "Only the questions [sic] of disability itself, which is a question of medical fact, is actually barred from judicial review."